IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al,

Plaintiff,

vs.

CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al,

Defendants.

_____/

and related complaints in intervention and petitions pending in other Courts for which consolidation is sought.

_____/

No. N12-1870

DECISION UPON MOTION OF INTERVENOR STATE OF CALIFORNIA FOR CONSOLIDATION OF PROCEEDINGS

The Court having previously taken under submission the above-entitled matter, the Court now issues its decision upon the matter as follows:

For the reasons set forth herein the motion of Intervener State of California to consolidate related matters into this proceeding is granted. The Court concludes that the predominance of common issues of law and need to avoid inconsistent rulings in a matter of urgent interest to those who are nearing or contemplating retirement outweigh other factors to be considered.

Non-complex matter

At the outset the Court must consider the requirement of CCP § 403 that the action not be 'complex' as defined by the judicial council (CRC 3.400). The matter is not provisionally complex as described in CRC 3.400 (c) and is not expected to have numerous motions or issues that will be time-consuming to resolve or a large number of witnesses. There are essentially two "sides" to the dispute.

In its moving papers the State indicates that the matter is not complex. The original respondents in the Contra Costa action, respondents in other county actions, and many intervening parties, each filed objections to the request for coordination upon the merits. None appears to contest the conclusion that the matter is not complex. The Court will therefore accept the view that the motion is properly before it pursuant to CCP § 403.

Factors not significant in context of these proceedings

CRC § 3.500 designates the numerous factors to be considered upon this motion. Several of them, because each of the actions is a petition for writ of mandate as opposed to a standard civil action, do not warrant serious concern.

1. Convenience of parties, witnesses and counsel. As a mandate proceeding the number of persons in each out of county case required to appear in Contra Costa should be very few and this Court regularly allows telephone appearances in lieu of personal attendance.
2. Relative development of the actions. Each of the actions appears to just be reaching the stage of being organized in terms of determining the parameters of the determinations to be made. None have been involved in 'discovery'.

3. Efficient utilization of judicial facilities and staff resources. The undersigned judge has a research attorney assisting and the consolidation will not diminish the ability to use such resource. With the current budget crisis in California's Superior Courts the use of one judge appears more economical than using four. To the extent that appellate review will be sought, the interests of justice are best served by coordination in only one appellate district.
4. Calendar of the Courts. The coordination should not delay the ability to reach a trial court determination. The significance of the issues in each of the cases is such that readiness for review at the Court of Appeal level is important.
5. Likelihood of Settlement. The need for consistent rules in the State (even though past experiences of various counties or agencies may lead to different outcomes) would appear to make 'settlement' unlikely.

Common Questions of Fact or Law Predominate

Under CCP § 403 this court must also determine whether the actions involve common questions of law or fact within the meaning of CCP § 404. CCP § 404.1 commences with the language:

> "Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation;" (other factors, discussed above, follow).

An examination of the original petitions in each of the four courts, as well as an

examination of the pleadings in intervention, shows that the central issue to be determined by the court or courts is whether the employees bringing the actions, or being represented, have rights that are "vested" so that they are constitutionally entitled, when they retire, to have their retirement benefits determined in the manner that each of the respective retirement boards were determining them prior to the adoption by the Legislature of AB 197. Those challenging the application of AB 197 do not question that the language of the amendment to Government Code § 31461 created by AB 197 purports to limit the items that may be included in "final compensation" in determining retirement benefits and thus acknowledge that any "new hires" would be restricted in what items can be included when they retire. Thus, the issue before the Courts in these proceedings is whether the rights of existing employees, not yet retired, can also be restricted without violating constitutional rights, i.e. are the former practices "vested" rights, and in what manner. Accordingly, the parties agree that this is an "as applied" challenge to the enforcement of the restrictions contained in Government Code § 31461 as amended.

The commonality of the major issues is demonstrated by a comparison of the respective petitions. The Contra Costa petition alleges that the Board "adopted and announced a new policy" to include "cash outs" (¶ 12), the Alameda petition alleges that those employees are allowed "to cash out five (5) weeks of vacation each fiscal year" and include those amounts in final compensation (¶ ¶ 26, 27), the Marin petition alleges that "other elements" of compensation such as standby pay, call-back pay, and cash outs for waiver of health insurance coverage have "long been" included (¶

17), and the Merced petition recites that “accrued vacation and holiday leave”, up to 160 hours, was by Board resolution ordered includable (¶ 11).

In the same respect each of the petitions alleges that the right to include such items in final compensation was “posted and published”, “represented and promoted”, “promised” or the like. (Contra Costa ¶ 20, Alameda ¶ 29, Marin ¶ 18, Merced ¶ 13-14). Each indicates that the relevant retirement board has indicated an intent to change its policies as indicated by AB 197 effective for retirements on or after January 1, 2013. (Contra Costa ¶ 22, Alameda ¶ 36, Marin ¶ 23, Merced ¶ 18).

This Court does not mean to suggest that there are not substantial differences in the questions that will need to be addressed in determining these petitions. The pay items (sometimes referred to as “pay codes”) that each Board has allowed to be included vary in nature from cash outs for benefits (e.g. vacation, leave, waiver of health benefits) to pay beyond compensation for normal work (e.g. shift standby). Likewise the amount of promotion of the benefits varied; some boards strongly encouraged use of the benefit and some just documented it in a handbook. Two of the retirement boards were named as defendants in litigation challenging their practices after the Ventura decision [1] and ‘settled’ with the plaintiffs in those actions.

Some of the petitions allege that in collecting contributions to the retirement funds pool the actuarial calculations used have taken into account the extended benefits;

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1 Ventura County Deputy Sheriffs’ Association v. Board of Retirement (1997) 16 Cal.4th 483.

this Court is unsure from the materials before it whether all four boards have done so and whether they were done for all pay codes. Additionally some parties rely upon 'promises' made directly by the applicable retirement board and some rely uponcontract provisions in their collective bargaining documents ("MOU"s).

The argument that these issues are so fact specific as to make coordination of the proceeds inefficient is belied by two things. Firstly, in at least the Contra Costa and Alameda actions petitions to intervene were filed by other and additional bargaining units and the request for intervention relied upon the similarity of the issues between the pending claims and the intervention claims. No original petitioning party opposed or criticized the intervention. Secondly, even within the petitions themselves some of the 'differences' to which reference is now made exist, i.e. some employees have been accumulating retirement benefit increases by some pay codes types and some by others. In particular, the Alameda petition lays out 16 "common facts" for the petitioners in that action and 4 common questions of law. A review of those lists shows that the concepts necessary to resolve each of the claims made are very much in common with those in the other county petitions.

The determination of the question of coordination really appears to come down to whether the decision making goes from the bottom up (i.e. starting separately with the facts as to each pay code and the practice in place for it) or from the top down (i.e. determining what factors make up a right to future retirement benefits being vested or not vested). It is the view of the undersigned judge that the latter judicial

approach is both more efficient and more just.

All of the petitions advocate for an "all existing employees are vested" approach. Thus, each petition raises the following common question.

> "Is each employee who became or remained employed as a covered member of any of the Respondent retirement boards, during a period when the relevant retirement board included in its definition of "final compensation" for calculation of retirement benefits items of compensation ('pay codes') now described by amended Government Code § 31461 as not includable, vested with the right to have his or her retirement benefits included such items as final compensation?"

There are subsets to this analysis that are also common to all, or at least most, of the factual situations. One is the issue raised by the State:

> "If a legal analysis shows that one or more of the retirement boards has been including an item or items in its calculation of final compensation that may not, by established law, be included in the calculation, is vesting as to such items unavailable?"

Other common questions are:

1. "Does the existence of a practice by a given retirement board as to calculation of final compensation create a contract that is constitutionally protected and thus create a vested right to that method of calculation?
2. "Does the vested right, if any, exist only in instances where the retirement board announced the right or encouraged its use as opposed to just having engaged in the practice?
3. "Are the various items that the 4 retirement boards included in final compensation prior to AB 197 all treated the same or are some subject to vesting and some not?

4. “Does the employee, to be vested, have to have already accumulated a benefit that can be “cashed out” and if he or she has so accumulated, can further benefits be accumulated in the future?”

The Court does not suggest to the parties that any determination of these issues has been made, even upon a tentative basis. They do demonstrate, however, that it is more likely than not that any common questions preponderate over questions to be individually decided. An analysis of these suggested questions does indicate, however, that the ultimate determination of mandate may involve many facets; the result could be a single determination or a host of individualized determinations based upon factual distinctions.

The risk of inconsistent results is significant.

If the matters are not coordinated it cannot be reasonably predicted whether or not the 4 venues dealing with the cases would do so in the same fashion. For instance, while the undersigned suggests an analysis that first determines ‘rules’ to apply to the varying fact situations, another jurist may use a very different approach. In any event, the risk of inconsistency cannot reasonably be denied. As the undersigned has previously cautioned, the stake in the outcome of this litigation is such that any decision is likely to be carried forth to the Court of Appeal (and in this case perhaps the courts in 2 separate districts). This factor, therefore, mitigates strongly in favor of coordination.

No flexibility lost.

A review of CCP § 403 shows that coordination is not the death knell of the separate actions. Indeed it may well be that good reason might exist, after some preliminary determinations, to redirect one or more of the actions back to their original venue. At this time, however, the interests of justice call for coordination of the proceedings.

Moving forward.

Counsel for the moving party (Deputy Attorney General O'Brien) is directed to prepare and submit to the Court appropriate orders to be lodged with the three transferee courts and all parties are encouraged to assist in a smooth and timely transition of the actions.

The Court will schedule (and separately notice) a case management hearing for the purpose of exploring with all parties the most efficient way to proceed toward a determination of the issues before the Court. Counsel for the petitioning and intervening parties are requested to meet and confer as to appointment of a lead or liaison counsel to assist the Court in the management of the litigation. Counsel for the 4 counties, and for any agency employers that have joined, should also meet and confer to determine what interests in management of the litigation they have in common.

The case management hearing will be held on **June 20, 2013, at 9:00 a.m.**

Dated: June 7, 2013

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Judge of the Superior Court